

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Jeremy THALER et al. GROUP: 1794
APPLICATION: 10/705,657 EXAMINER: H. Pratt
FILED: November 10, 2003 CONFIRMATION: 6140
FOR: PEANUT BUTTER WITH AN ORGANIC STABILIZER AND METHOD
FOR MANUFACTURE THEREOF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

PETITION TO THE COMMISSIONER

The Applicants/Appellants in the above-identified respectfully request that the Commissioner intervene in this application and direct the Examiner to conform to certain formalities with respect to the Supplemental Examiner's Answer dated July 23, 2009.

Applicants/Appellants respectfully submit that the Examiner failed to abide by the decision in a prior petition dated July 6, 2009. In particular, that decision required,

"The examiner ... to send a corrected examiner's answer that identifies the rejection as a new ground of rejection and includes the approval of the TC Director or designee. The appellant may then file either a request that prosecution be reopened by filing a reply under 37 CFR 1.111, or a request that the appeal be maintained by filing a reply brief or resubmitting the previously-filed reply brief, within two months from the mailing of the corrected answer[.]" (*Decision on Petition, Mailed July 9, 2009, p. 2; underlining added*)

The Supplemental Examiner's Answer dated July 23, 2009 not only failed to indicate that the Technology Center Director or designee has approved of the Supplemental Examiner's Answer and new grounds for rejection, but further failed to

identify any time period or alternative for response as required by the Decision on Petition.

Furthermore, in the Supplemental Examiner's Answer the Examiner has incorrectly stated that Appellants' prior statement of grounds for rejection is correct, when the grounds for rejection in Appellants' Brief (or Reply Brief) are clearly inconsistent with the grounds now set forth by the Examiner. Such inconsistency precludes the Board (and Appellants) from understanding with certainty the rejections that are currently pending in this application. Moreover, two of the three rejections set forth in the Supplemental Examiner's Answer are rejections that were previously considered by a Pre-Appeal Panel of conferees and withdrawn in favor of a new Office Action (see Notice of Panel Decision from Pre-Appeal Brief Review dated July 31, 2008, and Appellants' Second Reply Brief filed herewith).

Relief Requested

Due to an unextendable deadline for the Reply Brief, Applicants/Appellants have concurrently submitted a Second Reply Brief in order to preserve the Appeal (no further options having been set forth as noted above), and in the event this petition is not granted, fully intend to seek redress before the Board of Appeals when this appeal is advanced to the Board. However, it is respectfully urged that this matter should be appropriately dealt with by the Commissioner or a Group Director in order to direct the Examiner to clarify the record and assure that the procedures set forth in MPEP §1207 and the prior Decision on Petition have been followed.

Applicants/Appellants request that, in the event that the rejections currently set forth in the Supplemental Examiner's Answer are maintained, the TC Director or designee not only authorize such rejections for the record, but further indicate for the record an over-ride of the Pre-Appeal Panel conferees' prior decision to withdraw two of the three current rejections. The Examiner's reinstating a previously withdrawn rejection appears to be, at least on its face, a misuse of the Examiner's authority under the circumstances and forces Applicants/Appellants to expend further time and money to argue against rejections that a panel of three examiners have previously withdrawn.

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Applicants/Appellants respectfully request that they be further provided the opportunity to elect to re-open prosecution or to simply proceed to the Board of Appeals once the rejections to be heard by the Board are clarified. Should Applicants/Appellants elect, subsequent to this petition to re-open prosecution, they further reserve the right to request a refund of all fees paid for filing of the Notice of Appeal and the Appeal Brief.

In the event that contact with the undersigned representative of Applicants/Appellants is believed advantageous to the resolution of this petition, authorization is hereby provided to do so at 585-899-3970 x 104.

If additional fees are required as a result of this petition, including fees for extensions of time, authorization is hereby provided to charge such fees to USPTO Deposit Account No. 50-2737 for Basch & Nickerson LLP.

Respectfully submitted,

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